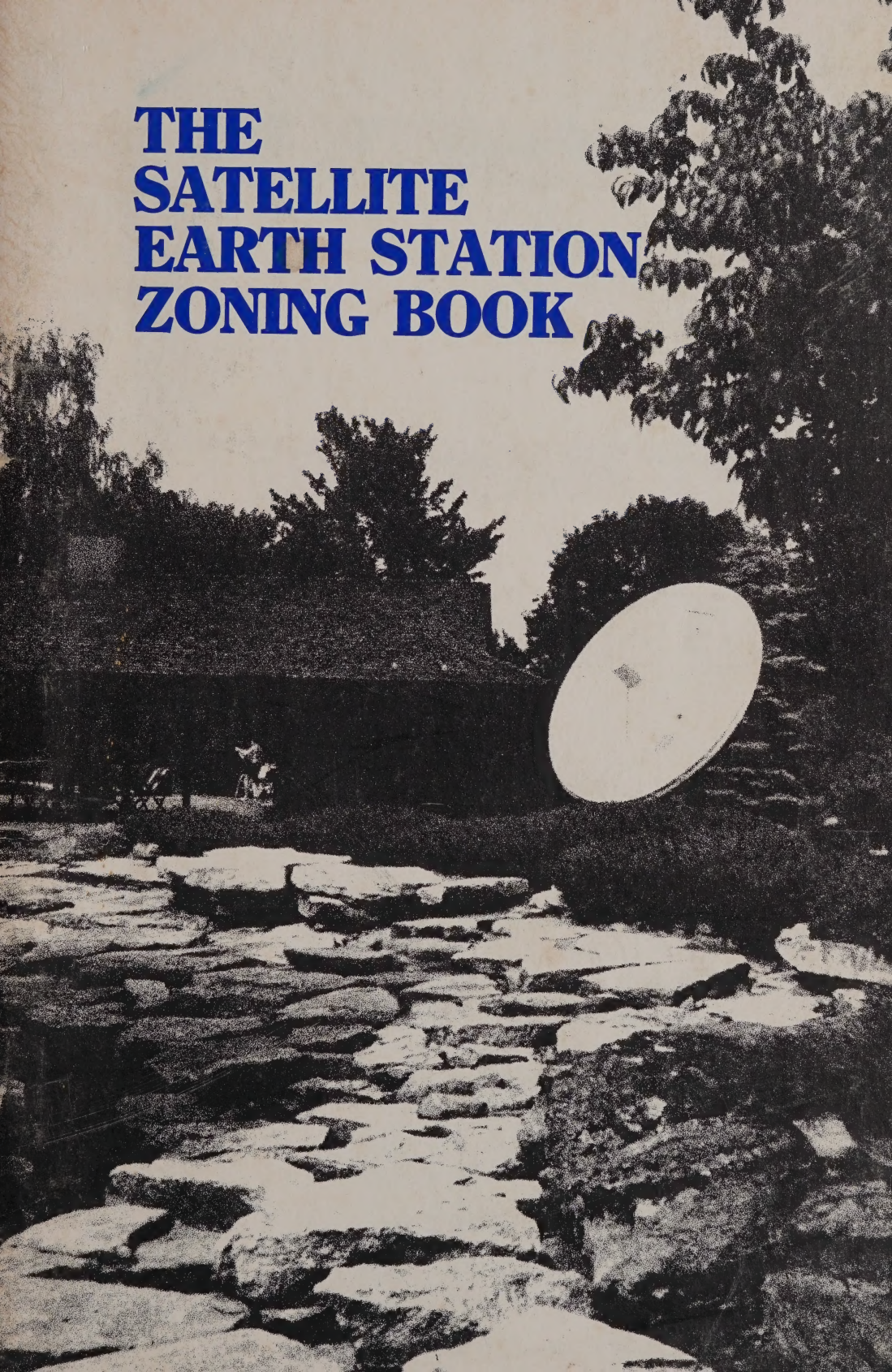
THE SATELLITE EARTH STATION ZONING BOOK



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THE SATELLITE EARTH STATION ZONING BOOK

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(SPACE)

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Preface

As home satellite earth station receivers continue to drop in price, direct satellite-to-home communications is moving from America's rural areas into the suburbs and urban centers of the land. Like flowers after a rain, satellite earth stations are popping up everywhere. The reception antennas generally have a diameter of between 10 and 15 feet. In nearly all cases, existing zoning ordinances do not specifically cover satellite earth station antennas. As the popularity of earth stations increases, zoning boards around the country are beginning to explore their role in regulating the installation and use of earth stations.

This manual is designed to assist the individual homeowner who is facing the possible imposition of zoning restrictions on satellite receivers, as well as the satellite earth station dealers and distributors who wish to be knowledgeable in this area of growing concern. It will also assist local attorneys throughout the country who are representing earth station owners in zoning cases. Zoning Board members should also find much of the information useful.

While the manual should provide assistance to earth station owners and dealers, it is, of course, no substitute for qualified legal counsel. But, even with experienced counsel, it will be necessary to do your homework. The manual will be a useful guide in that direction.

Introduction

With the Soviet Union's launching of the first satellite in the fall of 1957, the United States set upon a course to encourage the fullest development of satellite communications for the benefit of the American public. This commitment is manifested in the hundreds of millions of dollars that have been poured into research and development of launch capability and satellite technology. It has also been exhibited by a legislative commitment to the development of satellite technology. Congress has proclaimed that the policy of the United States is to foster satellite development responsive to national objectives and as an aid to world peace and understanding. This commitment to satellite communications has also been found in the actions taken by the Federal Communications Commission (FCC). Exercising its jurisdiction to regulate radio communications (which was delegated to the FCC by Congress in the Communications Act of 1934[1]) the FCC adopted an "open skies" policy for satellite communications development, encouraging entrepreneurs to commit their ideas and capital to develop an industry. The commitment to satellite communications has most recently been reaffirmed by the FCC through its decision to approve an additional eight satellite applicants.

Today, the potential for satellite-to-home communications is being realized. The wisdom of the FCC's policy of permitting market competition to govern the growth of satellite services has been demonstrated. It is estimated that by the end of 1983, over 200,000 homes will be using home earth stations to view the information and entertainment services available from over a dozen U.S. and Canadian satellites.

The era of the satellite has arrived. Satellites provide entertainment and educational programming that will revolutionize how Americans are educated and where they are entertained. The American consumer is the beneficiary of this telecommunications revolution. For the first time in history the consumer can pick and choose from up to 60 channels of programming ranging from news and entertainment to religious services, broadcast and specialty channels, channels devoted to minority issues, foreign languages, sports, education, and even the proceedings of the U.S. Congress. All of this is available in the privacy of one's own home.

However, the actions of a few local municipalities adopting unreasonably restrictive zoning laws threaten the full realization of satellite communications. These restrictions have taken the form of unreasonable setback requirements, "special use permits," provisions declaring satellite receivers to be "billboards," and outright bans on the installation of satellite antennas.

If there were a body of legal cases which directly covered earth station installation issues, dealing with unreasonable zoning ordinances or proposals would be a much simpler task. However, because the earth station industry is still so young, no such body of case law exists. Therefore, the best approach to counter unreasonable zoning restrictions is to rely on analogous situations involving the installation of amateur radio towers, as well as on FCC regulations, federal precedent and federal preemption. These, as well as recommendations on how best to prepare for a zoning hearing, are explored in this volume.

[1] 47 U.S.C. §101.

I. Satellite Antenna Size and the FCC

In order to deal effectively with zoning restrictions being applied to satellite earth station installations, it is useful first to review the development of satellite technology and the FCC's regulation of the industry. The satellite system used to distribute video programming is really a kind of long distance relay system. Satellite programming is first transmitted to one of a dozen satellites by an "uplink" which is usually fixed in one location, but may be transportable. (Frequently the television networks use transportable uplinks for "on-the-scene" reporting.) The satellite acts as a giant mirror reflecting the signal back to earth in such a way that it is receivable throughout the United States. The signal may be received through use of a satellite antenna. After the antenna picks up the signal, it is amplified and the frequency is "downconverted" so that the programming may be displayed over a standard television set. As a general rule, the size of an antenna is related to the frequency of the signal to be received. Existing satellite transmissions occupy the 4–6 Gigahertz (GHz) range. (A GHz is one billion cycles per second.) Future satellites are designed to transmit in the 12 GHz range.

When the FCC first established the framework for the development of satellite communications, it required each satellite earth station to obtain a federal license. In order to obtain a license from the Commission, an applicant had to demonstrate compliance with various technical requirements. Through its regulations, the Commission sought to ensure that a quality signal was delivered to the consumer. The practical effect of the FCC's regulations was that satellite receivers used in the 4-6 GHz range were required to be at least 10 meters in diameter. The result of this size requirement was that the average earth station cost over $100,000.

In the late 1970's, the FCC changed its policy. After an extensive examination, it determined that free and open marketplace forces should establish the size of earth stations. Therefore, it abolished the requirement that dishes be at least 10 meters in diameter, believing that the marketplace would ensure that satellite earth stations of an adequate size were used. At the same time, the FCC also eliminated the licensing requirement.

As a result of the FCC's farsighted decision, entrepreneurs immediately started ex-

Earth station enhances value of Florida home.

perimenting with earth stations of different sizes. They found that, depending upon both their location in the country and the satellite being tuned in, earth station dishes as small as 10 feet in diameter were feasible. At the present time, satellite earth stations of at least this diameter are required to obtain a satisfactory picture from most 4–6 GHz satellites. (Dishes with a smaller diameter may pick up an adequate signal in some parts of the country.)

In most southern locations, such as southern Florida or many parts of Texas, a dish 10 feet in diameter is generally inadequate to produce a picture of satisfactory quality. In these locations, dishes with larger diameters such as 12 or 15 feet are required because the intensity of the signal of most existing U.S. satellites becomes smaller as the reception location is removed from the center of the country.

Earth station brings information and entertainment to America's rural areas.

The Congress gave the FCC the power to regulate interstate communication. The FCC, in turn, makes regulations which govern the nation's communications systems. When the FCC removed its size restrictions, it sought to permit the marketplace to determine the optimal antenna size and configuration. By removing these restrictions, the FCC hoped that the lead time for the development of a widely-available satellite service would be minimized and the benefits of satellite technology would be realized in as short a time as possible. To the extent that local zoning restrictions unreasonably prevent the installation of satellite antennas, such restrictions may directly infringe on the federal government's authority to regulate interstate communication.

II. Local Regulation of Satellite Antennas

A. Police Power

Local governments have an established interest in the proper and ordered development of the community. Within certain bounds, they are empowered to regulate that development. The Constitution of the United States reserves various governmental powers to the states. Among these powers is the "police power." Many state constitutions grant such police power to local governments.[2] These powers enable communities to legislate for the general public welfare, as well as for the protection of the citizens' health, safety and morals, and in some states, the "physical attractiveness" of the community. Included within the scope of police power is the power to make and enforce reasonable zoning regulations. Typically, a local community acting through its Town Council will adopt zoning laws which govern the use of private real estate. These zoning restrictions are often administered by a Zoning Board or Architectural Review Committee which, at least in the first instance, makes the determination of whether a particular structure is or is not consistent with the law.

B. Building Codes

In addition to creating zoning laws, the police power is used to justify the adoption of building and safety codes. These restrictions empower local authorities to inspect the construction of certain structures, as well as specify some of the materials that go into the construction. Typically, the restrictions are administered by a building inspector who determines whether or not to issue a building permit.

Many communities require building permits for any construction of a significant nature. In order to obtain these permits, the structure will have to meet various building and safety code requirements. Generally, a fee must also be paid for such a permit. Such restrictions, which are designed to protect the safety of the community's residents, are a legitimate function of the community. Reasonable restrictions grounded in public safety concerns, if fairly applied to satellite receiver construction and installation, present few problems. On the other hand, if the fee is exorbitant, if the application for a satellite installation is unreasonable, or the time required to obtain the approval is unreasonably lengthy, these codes can act as a practical barrier to satellite installation and may be challenged. In one case, for example, a city is seeking to enforce a fee of $200 for a routine permit and impose an eight week processing time. In arguing against the imposition of a large fee on the installation of an earth station to obtain a variance hearing, conditional use permit, or a building permit, you should point out that the fee cannot be recouped. You should demonstrate that the antenna is installed for non-profit purposes, if this is the case, and that the added cost discriminates in favor of commercial enterprises and against private communications. SPACE is advised that amateur radio operators have often been successful in obtaining waivers of such fees on this basis. Finally, because building codes are based upon safety concerns, a building permit may not be withheld on aesthetic grounds. See Section III(A) for a discussion of aesthetics.

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[2] For example, see Cal. Const. art. XI, §7.

C. Deed Restrictions

Another type of restriction stems from the desire of an individual to control the future use of property that is being sold. When real estate is purchased, the deed granting title to the property may contain various conditions, covenants or restrictions. Often, developers or builders who wish to maintain a certain "character of the neighborhood" will include such restrictions. This is particularly true in the case of planned communities that were constructed in the late 1950s through the early 1970s.

Before purchasing any real estate, a thorough search should be made of the title to the property to determine the existence of any conditions, covenants and restrictions that might limit use of the property. This information can be obtained at the Town Hall, Bureau of Records or other similar location. It is recommended that this research be done by a title insurance company or qualified attorney who knows how to "search a title" and guarantees the accuracy of his or her work.

Should a deed not be examined before the property is purchased, the purchaser, in most cases, will still be bound by any restrictions in the deed. Most courts will assume that a real estate purchaser has approved any restrictions contained in a deed, even if the purchaser did not bother to read the restrictions beforehand. Very often courts engage in what is known as a "legal fiction"; they imply an agreement to the conditions contained in the deed even if the purchaser has never even seen a copy of the covenants. This is not to say that if your property contains a condition, covenant or restriction impairing your ability to install a satellite receiver, you cannot challenge such a provision. But, you should be aware that, at least historically, the odds are stacked against you in challenging such a restriction after the property has been purchased.

The most frequent use of deed restrictions is made by land developers. If your property is located in a recent development or a planned community, you should examine carefully the deed which conveyed to you title to the property in order to determine if there are any restrictions on the installation of earth stations. Once the entire subdivision has been sold, the land developer will typically turn over deed restriction enforcement rights to all lot owners in the community. The right to enforce such restrictions may also be assigned to a Neighborhood Homeowners Association, an Architectural Compliance Committee or the Village Trustees. So, the first step is to examine closely the deed that you have for your real estate to determine if there are any restrictions on its use which would impact upon your installing an earth station. Such restrictions might prevent the erection of structures of a certain size, height or proximity to the property lines. The deed itself may have only a vague reference to "restrictions of record" or the like and the only record of the conditions, covenants and restrictions may appear in the subdivision dedication of the developer far back in the chain of title.

If you are purchasing a new house from a developer, a copy of the conditions, covenants and restrictions should be demanded in advance of the purchase. (Perhaps this can be obtained through a real estate agent.) You may make a contract of sale contingent on the absence of any deed restrictions or covenants of record which could be interpreted to prohibit installation of a satellite receiving antenna. Again, this has proven particularly useful in amateur radio situations, as, at least until settlement, it places the burden of ascertaining the existence of restrictions on the seller. This may also be useful where the homebuyer purchases from the developer directly. Prior to purchase, the prospective home purchaser may also wish to consult with any existing neighborhood Architectural Compliance Committee about how it would feel about an earth station installation.

The courts have ordinarily enforced a valid and properly drawn covenant imposing maximum height restrictions when the language clearly stated such limitations. It is generally assumed, however, that because the tendency of such restrictions is to limit the otherwise proper use of property, such language should be narrowly interpreted. A deed restriction may be so vague or ambiguous in its wording that it is unenforceable.

For example, the court in *Karsoff v. Lucertini*[3] held that a 15-foot-high billboard was not a "building" within the meaning of the covenant limiting "building height" to one story. The court stated that if the complaining parties had desired to exclude all structures (not only buildings) above a certain height, they might have easily found appropriate language to express their purpose.[4]

The right to enforce a deed restricting the height of structures or buildings may be waived or abandoned. This occurs most frequently when an individual fails to have previously insisted on strict compliance with the limitation[5] or where the court finds, as a matter of fairness, that the cost of complying with or removing the violation far exceeds the slight infraction of the covenant.[6] Any change in the character of the neighborhood may also justify a court's refusal to enforce a height restriction. In challenging a deed restriction on a satellite receiver installation, carefully check the exact wording of the restriction, and on whether it has been previously enforced or ignored. Your success in making this argument will depend on your ability to show that the existing violations are significant or similar in character to the earth station antenna. Attention should also be paid to whether the neighborhood has changed sufficiently so that a court could find the historical reason for the covenant in the deed no longer exists.[7]

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[3] 103 A.2d 812 (Conn 1954)

[4] See Appendix II for cases concerning ambiguously worded restrictive covenants.

[5] *Melson v. Ormsby*, 151 N.W. 817 (Iowa 1915); *Rich v. Isbey*, 288 N.W. 353 (Mich. 1939).

[6] See *Holmes Harbor Water Co., v. Page*, 508 P.2d 628 (Wash. 1973).

[7] See *Henry v. Eves*, 159 A. 857 (Pa. 1932).

It should be emphasized that deed restrictions are different from zoning ordinances. Deed restrictions are imposed by the seller of Property. They may be enforced through legal action by neighborhood associations or other property owners in the neighborhood. Zoning restrictions are adopted by a Community Council, Zoning Board or similar organization and are enforced by the Boards and Town Councils.

Once local building codes and deed restrictions have been researched, local zoning ordinances should be examined to determine if they can impact on earth station installations. Unlike deed restrictions, zoning ordinances cannot be found by examining the documents of title for the property. Instead, a thorough review of the local law must be made. Again, the help of a professional is recommended. Also, do not take anyone's word about what a particular zoning ordinance says.. not your friends, not your neighbors and not the local Zoning Inspector. Ask for a copy of, or a citation to, the specific provision in the law which supposedly restricts earth stations. Take a look at it yourself or have your attorney do so. You may find, for example, that a provision which the City Inspector or Architectural Compliance Committee says applies to your satellite receiver really does not apply. In at least one community, a local inspector had said that installation of a satellite receiver was banned under the law while the local ordinance restricted only "billboards." The argument, of course, was successfully made that a satellite antenna was not a billboard.

D. "Neighbor Consent" Ordinances

In some areas, the municipal authorities, wishing to proscribe certain property uses, have provided by ordinance that permission for specified uses or types of construction not be granted unless the applicant first obtains the consent of a certain percentage of the neighboring property owners most likely to be affected. It is possible that such an ordinance covering the use and construction of "structures" or "buildings" may be construed by the Zoning Board to apply to satellite antennas as well. Should this be the case, there are several grounds on which to demonstrate the inappropriateness of the "neighbor consent" ordinance. While no case law specifically addresses the issue of neighbor consent with regard to satellite antennas, there is considerable judge-made

Modular earth station design adopted to blend with modern architecture.

law in other related areas suggesting that a successful argument may be made against such "neighbor consent" provisions.

A strong argument against a "consent" ordinance is that the act of entrusting neighbors with the right to decide what can and cannot be erected or conducted within a certain zone is an unlawful delegation of legislative authority to individuals. In many cases, the courts have held "consent" provisions invalid as an attempt to delegate to property owners a power exercisable only by duly elected legislative bodies.[8] Such provisions would virtually make the right to build or erect a structure dependent on the whim of owners in the vicinity, without guidelines or standards, the result being unequal treatment under the law.[9] Appendix I lists cases bearing on this argument.

In fashionable new developments earth station sitings are tested before home construction begins.

A related weakness of a "consent" ordinance is that it gives individuals the power to arbitrarily grant permission to construct or use property in a certain manner. A neighbor has the power to exclude one type of structure or use and allow another similar structure or use with no actual distinction or justifiable reason for such action. Such an arbitrary and capricious power which is discriminatory and is capable of being used without guidance or restraint can be readily attacked.[10]

A third area of concern respecting neighbor consent ordinances is that they are often overly burdensome, inconsistent or unfair in their application. Finally, the ordinances may constitute an improper exercise of the police power by municipal authorities. In permitting individuals to determine whether certain lawful uses of property offend the health, safety or general welfare, they are violating the fundamental policy of police power.[11]

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[8] In some instances, the courts have refused to find "consent" ordinances invalid on this basis and have instead upheld these ordinances finding that the ordinance in question was not an improper delegation of power but involved a power reserved by the people to themselves. The argument made is that both the Federal and State governments are creations of the American People and are thus able to wield only such power as the People expressly permit. The Supreme Court found that people could properly keep for themselves the power to have a say in how property is used. See *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). Note, however, that the Supreme Court stated that if the impact of the referendum could be shown to bear no relation to the police power, the fact that the voters of a community wished it, would not mean the ordinance was necessarily constitutional.

[9] See *State ex rel. Daniels v. Kasten*, 382 S.W. 2d 714 (Mo. App. 1964).

[10] Annot., 1 A.L.R. 4th 1021.

[11] See Appendix I listing cases. See also Annot., 1 A.L.R. 4th 1021.

III. Bases for Zoning Restrictions

A. Aesthetic Zoning

The safety and public health of a community may be protected by reasonable building codes. However, earth stations do not generally pose a threat to public health or safety. The usual reason a community restricts the size or placement (i.e., in the back or side yard) of an earth station is based on aesthetic concerns. A member of the Council or community may not like the way the dish looks, or may believe that the installation of the antenna might reduce property values in the neighborhood. Zoning restrictions which are premised on aesthetics may be challenged at both the Zoning Board or Architectural Compliance Committee level as well as in the courts.

Zoning restrictions premised upon aesthetic concerns suffer from several weaknesses. First, any regulation based upon aesthetics ignores the fact that what is not pleasing to one person may be pleasing to another. In fact, what is not pleasing to one person at one time may be pleasing at some time in the future, and vice versa. Permitting restrictions on earth stations based on aesthetics may be opening up a "Pandora's box" of unreasonable regulations. Such reasoning would seemingly allow zoning restrictions on the shape, type and color of houses, or even the kind of shrubbery or grass seed used. It is virtually impossible to define the public taste and equally impossible to protect something as undefinable and limitless as public taste.

Recognizing these problems, many states severely restrict or do not allow zoning restrictions which are based solely upon aesthetic concerns. However, care should be taken to counter any evidence submitted to the Zoning Board concerning public safety matters. The satellite owner should not let any such testimony go unchallenged. Often, courts will cloak a decision based on aesthetics in the mantel of public health. The court in *Presnell v. Leslie,* [12] for example, in prohibiting the installation of an amateur radio tower, took pains to point out that there was testimony that the amateur radio tower presented a potential hazard to children.[13]

One argument in support of a zoning law based on aesthetics is that restrictions are necessary to prevent construction which reduces the value of surrounding real estate. This argument has been used to oppose the installation of satellite earth station antennas. There is no evidence that the installation of an earth station decreases property values. In fact, the available evidence suggests the opposite.

Satellite-fed television sets are electronic hearths around which families are gathering. Earth stations, like other modern consumer items, such as solar heating panels or saunas, have become a reality in many areas. They enhance the desirability of the neighborhood and may actually improve the value and marketability of homes which are adjacent to that of the earth station

[12] 3 N.Y. 2d 384, 144 N.E. 2d 381 (N.Y. 1957).

[13] See Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal,* 20 Law and Contemp. Prob. 218 (1955).

owner. As did radio and television before them, satellite earth stations provide an electronic eye and ear on the world. Ownership of a satellite earth station constitutes a statement that the individual will neither take a back seat to technological development nor compromise his or her access to information. This reflects favorably on the property owners and the neighborhood. In short, there is simply no basis in fact or logic for a zoning law predicated upon a fear that the installation of a satellite receiver will depress neighborhood values. Appendix III of this manual contains a list of decisions summarizing what the law of each state is with respect to aesthetic zoning.

B. Types of General Ordinances Which May Affect Satellite Antennas

There are several different types of zoning ordinances that, without specifically mentioning earth stations, may impact upon zoning decisions governing installation in a residential or commercial area. By far, the most common type of ordinance first divides property into residential and commercial classifications. It permits "accessory uses," "accessory structures" or uses "incidental to" the main use of the land. In most jurisdictions that have not adopted a specific law targeted at antennas of one type or another, this is the sort of law that will be encountered. The question for the Zoning Committee or Board and ultimately for the court will be: Is an earth station installation an "accessory use" "accessory structure" or a use "incidental to" the normal use of the land? If it is determined to be such a use or structure, then installation of the satellite receiver is permitted. If it is not such a use or structure, the receiver may not be installed or a special permit or other authorization may be required before it may be installed.

A second type of restriction that may impact upon zoning decisions, particularly in areas zoned for commercial buildings or structures or for multi–unit dwellings, places height limitations on various types of structures and creates specific exceptions to these restrictions. Often, these exceptions will include such structures as chimneys, ventilators, sky lights, water tanks, and "similar structures." Problems of interpreting these statutes are encountered when the exceptions do not specifically include satellite receiving antennnas. If the antenna is considered to be a "similar structure," it will be an exception to the rule and it may be installed without concern to height restrictions. If the antenna is **not** considered to be a "similar structure," it may not be installed in such a manner as to exceed the height limitations, absent special permission of one type or another.

A third type of restriction specifically governs antennas. Usually, these restrictions were adopted to regulate use of outside TV antennas or amateur radio antennas. The question then arises: Do these restrictions also apply to earth station antennas?

1. "Incidental" or "Accessory Use"

Many zoning ordinances contain a statement providing that uses that are "incidental" or "accessory" to the normal use of the land are permitted. Sometimes examples of "accessory uses," "accessory structures" or uses "incidental to" the primary use of the land are provided. If satellite reception is considered to be an "incidental" or "accessory use," it is permitted. If it is not so considered, an earth station may not be installed without a special permit. There are no cases interpreting whether use of a satellite earth station is such a use.

Some guidance on how the courts might look at whether a satellite antenna is an "incidental" use of property may be found by examining cases that govern the installation of radio antenna towers. The courts have reached differing conclusions in these cases. The leading case supporting the conclusion that amateur radio towers are incidental uses is *Appeal of Lord.* [14] The ordinance provided, in relevant part, as follows:

> A lot or premise may be used for any of the following purposes:
>
> * * * * * *
>
> *(2) Accessory use on the same lot with, and customarily incidental to, any of the above permitted uses and not seriously detrimental to a residence neighborhood,...*

In adopting zoning restrictions, the board was empowered to take into consideration "the character of the district and its peculiar suitability to particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the borough."

The court found that even though the antenna might be considered unattractive by some, a homeowner could not be deprived of his right to use his property as he wished simply because someone felt a particular use was unattractive. Nor did the size of the antenna affect the court's decision. The court stated that the fact the mast (and antenna) was considerably longer than the usual mast (and antenna) did not take it out of the permitted and customary uses: "We believe that to so hold would place an unnecessary and unwarranted block in the road of progress and in the legitimate enjoyment of private property."[15] The cases which follow this line of reasoning do not accept the belief that a law may be based on aesthetics alone. Among the factors the court deemed to be important in reaching the conclusion that the antenna was an accessory or customarily incident use to home ownership were:

- the neighbors had not objected to a smaller antenna which had been located on the roof for several years;
- television antennas were common in the area, and
- the role of amateur radio in furthering understanding around the world as well as aiding in civil defense and natural disasters.

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[14] 368 Pa. 121, 128; 81A.2d 533, 536 (Pa. 1951).

[15] *Id.* at 537.

In *Village of St. Louis Park v. Casey* [16] a similar conclusion was reached. There, a court, looking at three amateur radio antennas which varied in height between 30 and 60 feet, found that the antennas were "customarily incident to a residential use." The court recognized that the use of radios in private homes was as universal as was the use of refrigerators. The fact that the homeowner's radio equipment was much more elaborate than that which was normally used did not take it out of the "customarily incident" category. The court found that the difference was one of degree, not of kind.

Reaching a similar conclusion, the court in *Dettmar v. County Board of Zoning Appeal* [17] provided further guidance as to the meaning of "customarily incident." The court stated:

> *The words "uses customarily incident to single family dwellings" mean the class of activity a family customarily does in or about their home. It does not limit the use to the identical activity chosen by the neighbors. As long as the activity is a form of family hobby, recreation or education it is permissible even though it may be unusual unless it is specifically excluded by a zoning restriction. The fact that not many people have amateur radio antennas no more precludes this use than the fact that not many people have tennis courts precludes their use.*

All three of these cases may be cited for the proposition that the reception of radio waves is a use customarily incident to the ownership of private property. These cases should have favorable impact on the installation of satellite receivers. See Appendix III containing a list of cases holding that radio or TV towers are an accessory use in a residential use district.

When confronted with an ordinance which defines various types of property uses and then permits only those additional uses which are customarily incident or accessory to the property uses defined, the home earth station owner should emphasize that satellite receivers bring valued informational and educational programming into America's homes. They provide specialized programming of interest to children, women and minorities. Earth stations enable citizens to watch the deliberations of the U.S. Congress, which furthers the goals of our participatory democracy. Earth stations are used to receive over a dozen religious services as well as movies and sporting events of broad public popularity. At the close of 1982, there were an estimated 100,000 earth stations installed on residential property throughout the United States. Earth stations are just a different type of TV antenna. Just because a neighbor has not yet chosen to receive information via satellite does not mean that other property owners should be precluded from doing so.

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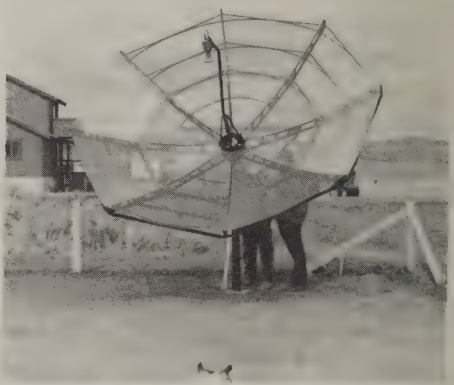
[16] 218 Minn. 394, 16 N.W. 2d 459 (Minn. 1944).

[17] 280 Ohio Misc. 35, 273 N.E. 2d 92 (Ohio 1971).

The leading case reaching the conclusion that an amateur radio tower is not an accessory or incidental use is *Presnell v. Leslie.* [18] In that case, the court found that a 40-foot amateur radio tower was not an accessory use of the homeowner's property. This case may be distinguished from earth station use by several factors. The court in *Presnell* emphasized the fact that the amateur radio operator, in addition to receiving radio communications, also engaged in **transmission**. This transmission activity separated the operator from mere passive radio reception. An earth station user could thus argue in those areas which follow the *Presnell* rule for amateur radio antennas that satellite reception, like other TV reception, is a mere passive activity which is distinguishable from the installation of an amateur radio tower from which radio waves are transmitted. Amateur radio towers are also much larger structures than receive–only earth stations. The court also found of significance the lack of evidence of the number of antennas of the type the defendant wished to erect in the area, and that children climbed on such towers. These factors may also be used to distinguish the *Presnell* case.

A closely related question concerns the ability of a community to require that an individual obtain a "special use permit" when he or she wishes to install a satellite antenna. This issue is very similar to the one faced by the Supreme Court of Colorado in *Baysinger v. City of Northglenn.* [19] In that case, the City had amended its zoning ordinance to require a special use permit for "radio towers and antennas." Various amateur radio operators challenged the law as being overbroad and won their case before the Supreme Court of Colorado. The court found that the ordinance applied not only to persons seeking to erect amateur radio towers and antennas but also to owners of television sets, AM/FM radios and other devices which required the use of an antenna. The court, overturning the ordinance, found that television and radio antennas are permitted accessory uses. It held that requiring a special use permit for accessory uses is an invalid and unreasonable exercise of the State's police power. This case is a strong precedent against an ordinance which requires a "special use permit" prior to installation of an earth station antenna. You should argue, in these circumstances, that a satellite antenna is a TV antenna of the same essential nature as any other TV antenna. If the more conventional ones are permitted, there is no reason for disallowing satellite antennas. It should be noted, however, that the court in the *Baysinger* case did recognize the locality's authority to adopt reasonable regulations governing the height of the antenna.



Earth station installation colored to blend with seaside surroundings.

[18] 3 N.Y. 2d 384 144 N.E. 2d 381 (N.Y.1957).

[19] 575 P.2d 425 (Colo. 1978).

2. Other General Limitations

A few homeowners whose earth stations are found to be accessory uses may face other limitations. In *Wright v. Vogt,* [20] for example, the issue was whether a 60-foot antenna tower complied with the maximum height limitation of two and one half stories (35 feet) placed on accessory buildings or structures or whether the antenna should be exempt from height restrictions under an exemption applying to chimneys, steeples or "similar structures." The court applied a broad interpretation to the statute and permitted the installation of the 60-foot tower, finding that certain structures similar to those exempted should also be exempted even though not specifically mentioned in the ordinance.

Earth station blends into urban environment.

Another variant of this situation occurs in a few large cities where the city has adopted some type of Planned Development Program. Typically, such programs require that prior to any major changes to the external structure of a building, surrounding neighbors must be notified and given an opportunity for comment. A key question in these cities is whether an earth station mounted on or adjacent to a dwelling in the Planned Development constitutes such a major change. If it does, substantial delays may be encountered. In these cases, the homeowner should try to show that an earth station installation does not constitute a major structural change and is not, therefore, governed by the Planned Development restrictions. Another approach is to show that these restrictions have been ignored in similar situations and should be similarly ignored with regard to earth stations. Or, applying them to satellite earth station installations constitutes arbitrary and unfair selective enforcement. Such selective enforcement of restrictions has been attempted in at least one midwestern city where the installation of some satellite earth station antennas was found to be governed by restrictions imposed by the Planned Development while other installations were not. The opportunity for favoritism in such selective enforcement is apparent.

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[20] 7 N.J. 1, 80 A.2d 108 (N.J. 1951).

IV. Legal Arguments Challenging Unreasonable Zoning Restrictions

A zoning restriction that denies a homeowner the right to install a satellite earth station on his or her property may not be legal. In Section II we discussed the police power which provides the basis for local zoning restrictions. When local regulations interfere with federal objectives in an area such as satellite communications, the local regulations may be unconstitutional and, therefore, unenforceable.

A. The Federal Interest

The Constitution, Congess and the FCC

The Constitution gives the federal government the power to regulate interstate commerce in order to encourage commerce by minimizing any trade barriers between the states.[21] For this reason, states and local municipalities may not adopt laws which impose a direct and undue burden on interstate commerce.

The Commerce Clause of the United States Constitution provides for the regulation of commerce among the several states and with foreign countries.[22] Congress, and Congress alone, has the power to adopt laws which are necessary and proper to regulate commerce.[23] Radio communications, such as that provided by existing domestic satellites, has been held to be subject to this federal power.[24] Numerous regulations have been enacted pursuant to this authority including the power to regulate the transmissions of "signals, pictures and sound of all kinds...including all instrumentalities, facilities, apparatus and services."[25]

When Congress adopted the Communications Act of 1934, it created the FCC to regulate "communication by wire and radio so as to make available...to all the people of the United States, a rapid, efficient nationwide and worldwide...radio communication system at reasonable charges." In 47 U.S.C. 152 (a), Congress directs the FCC to regulate all interstate and foreign communication by wire or radio. Congress has given the FCC significant authority to "maintain through appropriate administrative control, [the federal government's] grip on the dynamic aspects of radio transmission." *FCC v. Midwest Video,* 440 US.C. at 696, quoting *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940). Congress has instructed the FCC to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. 303(9), and to maintain federal control "over all the channels of interstate and foreign radio transmission." 47 U.S.C. 301.

Congress has also specifically articulated the role that it expects satellites to play in achieving national goals, improving the quality of life for all Americans and contributing to world peace. It sought to promote a global communications network

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[21] *Gibbons v. Ogden,* 22 U.S. 1, 84-90 (1824).

[22] U.S. Const., art. 1, §8, cl. 3.

[23] *Micheline Tire Corp. v. Wages,* 423 U.S. 276, 286 (1976); *See also U.S. Constitution,* Article 1, Sec. 8., cl. 18.

[24] See *Federal Radio Commission v. Nelson Brothers Radio* 289 U.S. 266, 279 (1933).

[25] *Id.*

which would be responsive to national needs. Congress has found that it is:

> *...the policy of the United States to establish,... as expeditiously as is practicable, a Commercial Communications Satellite System, as part of an improved global communications network, which will be responsive to the public needs and national objectives, which will serve the communications needs of the United States and other countries and which will contribute to world peace and understanding.*[26]

Following up on Congressional directives, the FCC has, over the last twenty years, continuously looked at the satellite area and taken great efforts to foster the benefits of the technology. In formulating its policies for satellite development over a dozen years ago, the FCC noted that:

> *The most important value of domestic satellites appears to lie in their potential for opening new communications markets, for expanding the beneficial role of competition in the existing markets for specialized communication services, and for developing new and differentiated services that reflect the special characteristics of the satellite technology. Realization of this potential will require innovative technological and service planning and development.*[27]

In order to realize the potential of satellite communications, the Commission established an "open skies" policy for satellite communications whereby both the space and ground segments of the technology are intended to expand in the marketplace unencumbered by regulatory restraint. While the FCC initially required that earth stations comply with various technical standards, these requirements were eliminated, the specific objective being that the marketplace, not government restriction, should control the development of satellite receivers.

B. Interference with Federal Objectives

A zoning law that limits the diameter of a satellite receiver or restricts its placement on an individual's private property interferes with federal objectives in several ways. The diameter of the antenna is directly related to its ability to pick up satellite transmissions. By restricting the diameter the municipality limits the ability of the owner to receive communications from all United States domestic satellites. A zoning law limiting that diameter amounts to both a restriction on the use of an individual's private property as well as an interference with the Congressional objective of maximizing satellite technology.

Similar problems are encountered with requirements which force satellite antennas to be located on a side lot or backyard. In many cases, enforcement of such restrictions can result in a practical ban on earth stations. In order for an earth station to operate, it must have direct, unencumbered line of sight to the desired satellite. Satellite transmissions in the 4–6 GHz range do not

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[26] Communications Satellite Act of 1962, Pub. L. No. 87-624, §102(a), 76 Stat. 419 (1962), 47 U.S.C. 701, *et. seq.*

[27] *In re Establishment of a Domestic Communications Satellite Facilities by Non-Governmental Entities,* 22 FCC 2d 86, 95 (1970).

bend. If there are trees, a house, a series of buildings or any other natural or man-made structures in a direct line with the satellite, the earth station will not be able to receive the satellite signal. A line of sight may be available from a given location in winter, but be blocked by foliage in the summer. Thus, an earth station installer pays particular attention to the line of sight to make absolutely certain that the earth station is being installed for all seasons. The best location may be in a backyard in which case that is where the receiver will be installed. If, however, the optimal location is in a front yard and a local ordinance prevents the installation in such an area, then the ordinance has the practical effect of preventing earth station installation and denying the homeowner the full benefits of satellite communications. Such a result is inconsistent with owners' rights to use property and with Congressional intent to foster the expansion of satellite technology.

The city, in defense of its zoning restriction, could argue that the federal government's power in these areas is not absolute. There are court decisions supporting the proposition that local governments should continue to regulate in those areas where local governments have traditionally regulated.[28] It can also be argued, to the extent it is possible, that federal and state objectives should be reconciled.[29] However, local governments have not historically regulated the installation of earth stations. Satellite communications, like the automobile or airplane, developed subsequent to the evolution of local government regulation. In looking at areas of comparatively recent technological development, the courts have frequently found that the federal interest is paramount and that local regulation inconsistent with the federal interest is preempted.[30] Again, legitimate safety considerations can be met by adoption and enforcement of reasonable building codes. It is SPACE's belief that a zoning restriction which acts as a complete ban on the installation of a satellite receiver interferes with federal objectives.

C. Satellite Communications is Federally Preempted

Another challenge to local zoning laws that adversely affect earth station installations is the doctrine of federal preemption. This doctrine prevents local governments from regulating subjects that Congress intended to regulate exclusively. Federal law supersedes state law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." There are three principal grounds on which a court may base a finding of federal preemption:

1. A dominant federal interest is present; [31]
2. Because of the subject matter involved, a federal statutory scheme indicates a Congressional intent to regulate the entire field; [32]
3. The local ordinance impedes or impairs the realization of Congressional objectives.[33]

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[28] *Cf. San Diego Building Trades v. Garmon* 359 U.S. 236 243-244(1959).

[29] *Silves v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

[30] New York State Commission v. FCC 669 F.2d 58 (N.Y. 1982) (New York State effort to regulate satellite-supplied apartment houses preempted by federal interests in development of interstate communications.) *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (municipal restrictions on airport takeoffs and landings federally preempted).

[31] *Hines v. Davidowitz*, 312 U.S. 52 (1942).

[32] *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 633 (1973).

[33] *Ray v. Atlantic Richfield Company*, 98 S. Ct. 988, 994 (1978).

A court looking at the field of satellite communications should find that this is an area which is federally preempted because of a dominant federal interest. The importance of satellites in the nation's communications and intelligence network amounts to a dominant federal interest. Everything from transcontinental television feeds and interstate telephone communications to national weather forecasting and strategic reconnaissance and surveillance for national defense is performed by satellites.

Federal preemption also may be based on a federal statutory scheme. Satellite communications is inherently interstate in nature. Recognizing this, the Congress has provided that the frequencies involved should be regulated at the federal level. The FCC approves new satellites, regulates power and location of satellites, and maintains an optional licensing scheme for satellite receivers. Thus, the nature of the subject matter and the complex network of federal regulation indicates that satellite communications is a subject matter that the federal government has manifested its intent to regulate. It is, therefore, preempted under the second test.

In the third instance, local restrictions on placement of an earth station can undermine Congressional objectives. Congress established the FCC and instructed it to promote the expansion of communications services. It specifically encouraged the development of satellite services to fulfill national objectives of world peace and understanding. A restriction on the ground segment of that communications system interferes with these objectives by preventing direct access to satellite services. To the extent that such restriction prevents the installation of an earth station, it should be federally preempted.

In arguing federal preemption in the field of satellite commuications, one Court of Appeals decision provides significant support and guidance. *New York State Commission on Cable Television v. Federal Communications Commission*, 669 F.2d 58 (N.Y. 1982). In that case, the court upheld an FCC determination that the field of satellite interconnected MDS microwave systems was federally preempted.[34] New York State had adopted a regulation, the practical effect of which was to interfere with, burden and limit service provided by MDS to apartment houses. The Commission and the court found that the effect of the regulation was to reduce the number of reception points which could view the service. Overturning the New York State regulation, the court found that it was the "effect rather than the purpose of state law which was controlling." In addition, the court found that a reduction in the number of reception points in one area adds to costs in another area, a result inconsistent with FCC obligations. This same argument might be applied

[34] MDS, or Multipoint Distribution Service, is a federally regulated, omnidirectional microwave service used in most cities to provide subscription programming to the residents of apartment houses and private houses. Typically, a satellite antenna picks up the subscription program and provides it to an antenna located at a high point in the center of the city. The subscription program is then transmitted in all directions throughout the city, received by special microwave receivers installed on rooftops, downconverted and viewed on conventional television sets.

to satellite reception. Local zoning laws which have the effect of prohibiting satellite installations increase costs to the public, a result which is inconsistent with the FCC's goals, as expressed by Congress in the Communications Act.

In defending its zoning laws, the community may argue that the FCC does not have regulations governing earth station location and installation, therefore, it cannot be argued that the Commission has preempted the field. The court in the *New York State Commission* case found that it had previously upheld FCC preemption even though the FCC itself did not have regulations governing the subject.[35] Merely because the FCC does not presently have regulations governing the local installation of earth stations is an unpersuasive argument against federal preemption of satellite services. As the court in the *New York State Commission* case found: "Federal regulation need not be heavy-handed in order to preempt state regulation." 669 F.2d at 66.

D. First Amendment

Another problem with enforcing a restrictive local ordinance is based on the First Amendment to the U.S. Constitution. Existing satellite communications contain multiple sources of information-type programming, including programming (such as news and religious services) that is not available via conventional television. To the extent that a zoning ordinance prevents the installation of an earth station or makes that installation very difficult to accomplish, it restricts the owner's access to information and may be in violation of the First Amendment.

The First Amendment was originally enacted to protect an individual's freedom to express opinions and ideas. Through the years, the courts have further defined the right of freedom of speech to include the effective dissemination of speech and expression.[36] The Supreme Court has held that television-type programming is entitled to First Amendment protection.[37] The First Amendment protects both informational and entertainment programming.[38] This right is not limited simply to the transmission of programming; it also encompasses the right to receive programming. The Court has determined that viewers and listeners have a First Amendment right to receive programming.[39]

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[35] See *Brookhaven Cable TV v. Kelly*, 573 F.2d 765 (2d Cir.) *cert. denied*, 441 U.S. 904 (1978). *aff'g* 428 F. Supp. 1216 (N.D.N.Y. 1977); *National Association of Regulatory Utility Commissions v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[36] *Dulaney v. San Francisco Mun. Crt.*, 11 Cal. 3d. 77, 510 P.2d, 5 (Cal. 1974); *Van Nuys Publishing Co. v. City of Thousand Oaks*, 5 Cal. 3d. 817, 821, 489 P.2d 809, 811 (Cal. 1971).

[37] *ABC v. United States*, 110 F. Supp. 374 (S.D.N.Y. 1953) *aff'd sub nom., FCC v. ABC*, 347 U.S. 284 (1954).

[38] *Winters v. New York*, 333 U.S. 507, 510 (1948).

[39] See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

The First Amendment rights are particularly important in this context in those areas where there are limited alternative sources of programming. As a general rule, speech may be regulated by place and time in many limited ways and if done with clear and concise statutes which are reasonable. In *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), the U.S. Supreme Court reiterated the elements required in order to permit a time, place, and manner restriction on the right of free speech. The Court declared:

> *We have observed that time, place and manner restrictions are permissible if 'they are justified without reference to the content of the regulated speech... serve a significant governmental interest, and... leave open ample alternative channels for communication of the information.'*
>
> *425 U.S. at 771.*

Among the arguments against a zoning ordinance preventing the installation of a satellite antenna is the fact that the interest served does not further a "significant governmental interest." Also, if the local cable system or other media do not carry a particular program or service which you desire to watch, such as a religious channel, this may be important in making your First Amendment argument and demonstrating a lack of alternative channels for communication of the information sought.

A statute which has the effect of a complete prohibition of speech and expression is generally not permitted.[40] Thus, a zoning restriction that establishes, for example, various options for the installation of satellite receivers might be constitutional whereas an ordinance which operates to completely prohibit such installation might not be.[41]

In analyzing an argument based upon the First Amendment the courts will be asked to weight an individual's right to receive information against the community's right to protect aesthetic appearances. The Supreme Court in *Metromedia, Inc. v City of San Diego*, 453 U.S. 490 (1981) has provided guidance on how the scales should be weighted. The case involved a city ordinance which attempted to restrict the type of billboards that could be installed in the city of San Diego. The ordinance permitted on–site commercial advertising, but prohibited other commercial and non–commercial billboards, unless permitted by one of twelve specified exceptions (such as temporary political campaign billboards.) The city of San Diego claimed the purpose of the ordinance was to promote the "safety" and "aesthetics" of the community.

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[40] *Cox v. New Hampshire*, 312 U.S. 569 (1941).

[41] Several state courts have addressed Constitutional issues in the context of restrictions placed on amateur radio antennas. A few courts have found, for example, that reception of radio waves is an inalienable Constitutional right of all and cannot be controlled by zoning ordinances. See *Appeal of Slemenda*, 115 Pitts. L. 224 (1957), *Schmigel v. Board of Adjustment*, 114 Pitts. Leg. J. 117 (Pa. 1966.) In California, however, a restriction on amateur radio antennas which limited their height to 40 feet withstood a First Amendment challenge, the court finding that the restriction was not a blanket limitation and that appellant could still transmit half way around the world. *Shroeder v. Los Cerritos Mun. Ct.*, 141, Cal. Rptr. 85, 88-89 (1977). It should also be noted that the ordinance specifically provided for waiver of the restrictions by the Planning Commission. The continued precedential validity of this decision is brought into question in view of the Supreme Court's decision in the *Metromedia, Inc.* case discussed above.

Overturning the San Diego ordinance, the Court found that while the city might distinguish between the relative value of different categories of commercial speech the community does not have the same range of choice in the area of non-commercial speech, found that the billboard ordinance had the effect of permitting some kinds of non–commercial speech, while prohibiting others, and was unconstitutional. An analogy may be drawn to an ordinance which permits some types of TV antennas which are used to access non–commercial information while forbidding others. In such a situation, the *Metromedia* case supports a finding that the ordinance is unconstitutional.

The concurring opinions of Justice Brennan and Justice Blackmun, spelled out clearly where the balance between police power and First Amendment rights should be:

> *Justice Black said it well when he stated the First Amendment's presumption that "all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition."*
>
> 453 U.S. at 525, 101 S. Ct. at 2901, quoting *Kovacs v. Cooper*, 336 U.S. 77, at 102 (1949).

The Justices specifically considered the issue of aesthetics versus free speech, and determined that the right of free speech is an important protected activity, and should not be restricted for the purpose of aesthetics. In so ruling, the Justices declared:

> *...I think that the city has failed to show that its asserted interest in aesthetics is sufficiently substantial...*
>
> *I do not doubt that "[i]t is within the power of the [city] to determine that the community should be beautiful," Berman v. Parker, 348 U.S. 26, 33...but that power may not be exercised in contravention of the First Amendment.*
>
> 101 S. Ct. at 2904.

If the issuance of a permit to install a satellite earth station antenna is based upon a discretionary determination, it may also be challenged as an unconstitutional prior restraint on speech. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The fact that judicial review is available to correct any abuses in the process does not serve to help such an ordinance.

In making this argument, the satellite owner must emphasize the fact that the effect of the ordinance denies him or her access to specific information which is constitutionally protected. Again, the fewer the alternative sources of information the better for making this argument. Also, the more discretion in the statute the more such a statute invites abuse. The Court has found:

> *Such aesthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.*
>
> *Metromedia, Inc. v. City of San Diego, supra*, at 2894.

Such an impermissible purpose could be a desire to prevent the practice of a given religion or to protect a cable television company from competition from satellite antennas.

There is at least one reported case governing the applicability of zoning ordinances to satellite antennas. In *Gouge v. City of Snellville*, 249 Ga. 91 (1982) the Georgia Supreme Court upheld the constitutionality of a Snellville, Georgia zoning ordinance which provided that "structures shall be permitted only in rear yards..." A structure was defined as including a satellite antenna and the earth station owner was enjoined from maintaining in his front yard the satellite television antenna which he used for personal and business purposes where there was a suitable alternative. The ordinance was challenged on a variety of grounds, including the First Amendment. The court, in holding for the city, found that the impingement on Mr. Gouge's First Amendment rights was minor. It found that the ordinance permitted him to place the satellite antenna in his backyard, "an act which Mr. Gouge's expert admitted, could be done with slightly greater expense and inconvenience." Because there was an "effective alternative" for receiving satellite information, the court found no abridgement of Mr. Gouge's First Amendment rights. The court found that "the added expense and inconvenience is not enough upon which to declare the ordinance unconstitutional as an arbitrary and unreasonable exercise of the police power." The case underscores the wisdom in the First Amendment area, of demonstrating that the ordinance in question acts as a complete bar to your reception of satellite programming.

E. Antitrust

Often, the impetus behind the adoption of a restrictive zoning law will be the local franchised cable television company. Some cable operators look upon satellite earth stations as potential competition. Such oeprators may go to the City Council or similar body and convince it that the earth station is "unsightly." Most cable television operators pay the city a portion of their revenue. That portion could be reduced if earth stations proliferate.

To the extent that it can be shown that the franchised cable television operator is attempting to prevent the installation of an earth station through the passage of, or discriminatory enforcement of a zoning restriction, such activity could be found to violate the Federal Antitrust Laws. Section 1 of the Sherman Act[42] makes unlawful all conspiracies and combinations in restraint of trade. Section 2 prohibits attempts to monopolize any part of interstate commerce. Section 5 of the Clayton Act[43] prohibits "unfair practices in commerce." Cities and Zoning Boards should be especially cautious of any such attempts by cable systems. The exemption of municipalities from the antitrust law is now extremely limited. See *Community Communications Co. v. City of Boulder, Colorado*, 102 S. Ct. 835 (1982).

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[42] 26 Stat. 209 (1890) as amended, 15 U.S.C.A. §1–7 (1977).

[43] 15 U.S.C. §12 *et seq.*

V. Preparation For a Hearing Before the Zoning Board

A. Know the Zoning Board

It helps to know who is on your local Zoning Board prior to your appearance before it. Often, Board members have other full–time occupations in the community. Before you go before the Board, check out its membership. You may have ties to one or more members. You may have worked with them on other projects or they may be customers of yours. Determine if any of the members of the Zoning Board are affiliated with the local franchised cable television company. Many cable operators view "backyard" earth stations as a form of unwanted competition to their businesses. Under these circumstances, a "fair hearing" for you could be denied.

B. Selecting Your Attorney

Care should also be taken in selecting your attorney and it is recommended, in most cases, that you use one. The world is increasingly made up of specialists. The family attorney who wrote your mother's will may be excellent at writing wills but may not know anything about zoning ordinances. One of the best ways of selecting an attorney is by word-of-mouth recommendations. Have any of your friends or business acquaintances been involved in zoning issues? If you cannot obtain references from any of these sources, try your state or local bar association. Many bar associations maintain a list of practitioners in each area who specialize in zoning law. Usually, several names will be given to you. Do not be shy—call them up and do some comparative shopping. But remember, it may not be possible for the attorney to give you all the costs involved until he or she has thoroughly examined the problem. Also, cheapest is not necessarily best when it comes to legal representation. Further, do not be afraid to ask what other zoning cases he or she has been involved in and what references can be supplied.

C. Know Your Enemies and Bring Your Friends

Before the hearing, every effort should be made to consult with the Zoning Inspector, Chairman of the Architectural Compliance Committee or anyone else who will be deciding your fate. Find out why they are concerned about your property. Did someone complain? If so, who? What was the complaint based upon? In your conversations with these community officials there are several "buzz" words to avoid. Stay away from the words "tower" and "microwaves." Your "satellite antenna" is a device that is a passive receiver of communications in the air which does not cause electrical interference in the community.

Prior to your hearing, you should determine your neighbors' attitudes toward the earth station. An effort should be made to bring friendly neighbors along to the hearing. One rationale for deciding the *Presnel* case, discussed earlier, against the amateur radio antenna owner was that 20 residents of the village showed up at the hearing to oppose a grant of the permit whereas only five persons favored it, and only three of the five were village residents. One of the key factors in *Appeal of Lord*, also discussed earlier, was the fact that 34 of

the near neighbors signed a petition stating that they did not object to the installation of the antenna. If there are other owners of earth stations in your area, they should be contacted and asked to testify on your behalf. If they have neighbors, the neighbors may also testify that the use of an earth station has not bothered them. If you are unable to get a supportive witness to personally attend the hearing, ask if he or she would submit a letter instead. These letters usually can be presented at the time of the hearing. On the other hand, if, in your canvassing of neighbors you find someone who objects to the earth station, you now have the advantage of at least knowing his or her objection before the hearing so that you are better prepared to address it.

D. Get All the Help You Can

Depending upon the community involved, other witnesses may be useful. In a growing number of communities, for example, the construction of an earth station has been used to teach high school and college students about electronics. In other areas, school systems use earth stations to access the wide variety of educational services available exclusively by way of satellite. If this is the case in your community, the instructor of such a course or a school representative may be helpful to you at your hearing. Also, a growing number of churches have installed satellite earth stations in order to view one of the many religious satellite services. Bringing your minister, priest or rabbi to the hearing may be helpful. Additionally, some of the satellite services such as the Appalachian Cable Service Network (ACSN) have local college affiliates across the country. You should contact your local college to determine if it is an affiliate of ACSN or any other satellite-supplied educational services.

Other sources of potential support can be found by examining the various services available on the satellite. For example, there are several health-related channels available by way of satellite. Some physicians have used their satellite earth stations to comply with the continuing educational requirements of their profession. A high school class in meteorology may watch the weather channel. Some disabled persons use earth stations to view religious services not otherwise available. Others subscribe to the financial news services. Support in your efforts to protect your satellite earth station should be sought from these program services.

E. Obtain a License For the Earth Station Receiver

As noted earlier, the FCC eliminated its mandatory license requirement, and, in its place, instituted an optional licensing process. If your antenna qualifies under various technical rules, you may still receive a license from the FCC. The license will protect against future sources of electrical interference. It might also be of use to you when you appear before the local Zoning Board. It is strong evidence of a federal interest which might persuade the Board to stay clear of this area.

F. Will the FCC Help You?

In your battles with local zoning officials, do not look to the Federal Communications Commission to actively come to your side. (It is unlikely they will enter into the case on the other side either.) Because of limited funds and staffing, the Commission simply does not have the resources necessary to become actively involved in multiple zoning disputes around the country. Also, from a philosophical standpoint, the FCC is generally not interested in jumping into local battles to tell local governments what to do.

G. The Most Common Objections

1. Microwave Radiation

Be prepared for the question: Does this device cause harmful microwave radiation? In responding to this question, you should point out that satellite earth station antennas are, like traditional television antennas, merely **reception** antennas; they are **not** transmitters. You may state that any electronic device, be it a radio, television or satellite earth station receiver, may, from time to time, emit small amounts of acceptable radio signals. Also, depending upon the electronic configuration of your satellite receiver, its manufacturer may have obtained FCC type acceptance or certification. This can be determined by examining the receiver itself. Evidence of FCC certification or type acceptance of your receiver design may help you to controvert a Zoning Board's objection based on radiation. You should note, however, that FCC certification or type acceptance is not required of all satellite receivers.

2. Aesthetics

To date, the most common objection to the installation of a satellite earth station receiver has been made by those individuals who simply do not like the way it looks. To address these types of objections, several points should be made. First, you may argue that if aesthetics alone are allowed to dictate what types of structures are, or are not, permitted in your community, then everyone should have the right to object to the shape of your neighbor's home, its color, the material with which it was made, or the landscaping surrounding it. Other objects, such as patio umbrellas or basketball backboards, could be next on the list. Most people would not tolerate this amount of government intervention into their private lives. You may wish to stress what is aesthetically pleasing varies from person to person and from time to time. In addition, provided it does not reduce your ability to receive satellite signals, you may wish to offer to paint your earth station so that it will blend in with the other foliage or structures in the area or to reduce any glare it produces. You may wish also to offer to shelter it by planting foliage, shrubbery, etc., around the earth station.

Sometimes the aesthetic argument is couched in terms of "If you install that satellite receiver on your property, it will reduce the value of my property." There are a variety of ways to address this argument. First, SPACE knows of no evidence whatsoever indicating that the installation of a satellite earth station antenna on one piece of property will cause a reduction in the value of another. In fact, it appears that

the opposite is true. In many areas, satellite earth station antennas denote a degree of wealth. Not everyone has between $3,000–$15,000 to install an earth station. It should financially benefit the surrounding neighbors by underscoring the quality of the neighborhood. You should obtain a statement from a local real estate broker in your area that the antenna increases (or at least does not decrease) property values.

Another approach is to travel around your community and take pictures of existing structures which have visual impact greater than the satellite earth station antenna you anticipate installing. Satellite earth station owners can learn from the experience of amateur radio enthusiasts who have been fighting a similiar battle for many years. A recent publication of the American Radio Relay League reports that:

> *... some hams have effectively used slides of pictures taken of local utility poles and towers, other residents' television antennas, and antennas located on City Hall that illustrate that the proposed amateur antenna is of less visual impact than those structures already existing.*

One of the principal reasons that the court upheld the installation in *Village of St. Louis Park v. Casey*, previously discussed, was the fact that there were six amateur towers in the area, some of which were larger than the defendant's. Other points to emphasize in your arguments include the existence of any natural structures such as trees and hills, which will screen the proposed antenna from the public view, the absence of guidewires and the "low profile" of the antenna. Again, it pays to do your homwork. Check out your community. See if there are any other satellite earth stations in place. See also if there are any large television or amateur towers. The presence of these other antennas may increase your chances of gaining Board approval.

3. "Legality"

"I have heard that satellite earth stations are illegal for individuals to own" may also be an argument thrown in your direction at the zoning hearing. The fact that the statement is completely false does not prevent it from being made. No court has found that private earth stations are illegal or for that matter that viewing any particular satellite service is illegal. Much confusion has resulted from the sale of unauthorized pay TV decoders to watch pay TV stations in some cities. Unauthorized pay TV decoders are used for one purpose only—to obtain pay programming without paying for it. Satellite receivers have multiple uses, however. To help guard against this argument, you may wish to write to one of the numerous satellite services that authorize reception of their signal by private earth station owners. C-SPAN, which televises the proceedings of the U.S. House of Representatives, would be a good choice. Its address is 400 N. Capitol Street, N.W., Suite 155, Washington, D.C. 20001. The telephone number is (202) 737-3220 and the contact person is Jana Dabrowski. C–SPAN specifically permits viewing by home earth station users and has the added attraction of being a program of general civic interest.

4. Safety

The argument may be made that the satellite receiver may fall over or take off in a high wind, potentially harming someone. Another variant of this argument is that the satellite receiver may be an "attractive nuisance" drawing little children to it who could be harmed by climbing on it. One of the factors in the *Presnell* case was the fact that there was evidence before the Zoning Board that children could climb on the antenna tower which had a stepladder attached to it.

In addressing these concerns, the satellite earth station owner should emphasize that satellite earth stations are very different structures from amateur radio towers. Circular or parabolic, they do not possess the attraction for climbing that an amateur radio tower may have. Where necessary and possible, the receiver owner should offer to enclose the earth station as much as possible. All safety concerns may be met by compliance with building codes. After all, safety concerns for structures far more substantial than a satellite receiver are met through enforcement of building codes.

Additionally, if the owner has liability insurance available to cover any casualty caused by the earth station this fact should be made known to the Zoning Board. It will evidence a responsible attitude on the part of the earth station user and afford neighbors reassurance that their concerns are being considered.

Earth stations take their place among the farm buildings.

VI. Earth Station Installation and A Reasonable Zoning Law

While arbitrary or unreasonable zoning restrictions imposed on the installation of earth stations may be judicially challenged, such a challenge takes time and resources. It is preferable to work with your City Council or Zoning Commission to develop acceptable legislation which will allow you to enjoy your earth station while safeguarding the concerns of neighbors and the Zoning Commission.

The starting point for such an effort is to determine from which locations on your property you can get a line of sight with the satellite(s) you wish to view. If such a line of sight can be obtained from a point located in your backyard, that is where the receiver should be placed. If, however, the view is blocked, then other locations on the property should be tested. Remember, if you have line of sight through the trees in winter, this could be blocked in summer. The installation should also be done by an experienced professional and care taken to ensure that to whatever the antenna is attached is itself secure.

The finishing touches being put on a roof top installation in a suburban community.
(Courtesy COOPs Satellite Digest)

If a proper look angle cannot be obtained at ground level, you may wish to install your antenna on a raised structure. One New Jersey operator reports using a thick section of wall pipe to install an antenna above the level of the house. The entire mast looks somewhat like a basketball backboard.

After the ideal installation location is determined, maximum effort should be made in shielding the earth station. This may be accomplished by natural or man-made objects. New foliage should be planted to screen your earth station if necessary. The exact type will depend upon climate and personal taste. In general, rhododendron, azaleas or pyrocantha may be used in moderate climates. Also, bamboo grows very quickly and forms a thick shield. Another alternative to foliage barriers is natural terrain, including the installation of an antenna in an excavation.

Section VII of this manual contains two model zoning ordinances, the provisions of which reflect the above practical concerns. It is important to remember that a little care and consideration ahead of time may avoid a challenge to your earth station in the future.

VII. Model Zoning Ordinance

The following model zoning ordinances may be used as prototypes for an ordinance in your local area. These ordinances maximize the right of an earth station user to install and operate his or her facilities while incorporating provisions that protect the concerns of Zoning Boards and residents.

Ordinance I

Ordinance 1 was derived with some modifications from a California county ordinance passed in 1983. Section 1 contains a definition of a satellite television antenna. Section 2 specifies that satellite antennas, like non–commercial radio antennas are permitted as accessory structures. Section 3 authorizes roof mounting but sets a height limitation. Exceptions to that height limitation are contemplated by obtaining a special use permit. A special use permit is also contemplated in the event that a ground installation exceeds the height limitation contained in Section 4.

Finally, set-back requirements are imposed on ground-mounted satellite antennas by Section 4b.

Ordinance 2

Section 2.2 of this ordinance provides that, subject to the exceptions contained in the rest of the ordinance, the antenna should be placed in the backyard in the case of residential property. Section 3.1 provides a height and diameter limitation. Section 3.2 imposes a requirement upon receiver owners to minimize visual impact of the receiver. Visual impact is measured from the street level. This is important because it may be very difficult to completely shield an earth station from an adjoining neighbor's second-story view. Section 3.3 provides that not more than one earth station should be installed unless the residential property exceeds one-half acre in diameter.

Section 3.4 imposes an affirmative obligation upon the owner of the earth station, to conform to applicable City Building Code and Electrical Code requirements. Requirements governing grounding and construction with non–corrosive or combustible materials are imposed by Section 3.5. This Section also requires that the receiver be installed in a wind resistant manner.

Finally, Section 2.2(i) allows installation on the roof of a single family residence, but only where all other alternatives have been examined and found to be unsuitable; a requirement that a permit be obtained in the event of roof construction is also imposed. The criteria for granting the permit are specifically set out in the statute. This reduces the chances of arbitrary action or delay.

Ordinance I

An Ordinance Pertaining to Regulation of "Satellite Television Antennas"

THE BOARD OF SUPERVISORS OF THE COUNTY OF _____
DO ORDAIN AS FOLLOWS:*

Section 1. A satellite television antenna is an antenna the purpose of which is to receive television or radio signals from orbiting satellites.

Section 2. Accessory buildings and structures:

a. In all zoning districts private non-commercial radio television antennas and towers are permitted as accessory structures.

b. In all zoning districts, ground-mounted and roof-mounted satellite television antennas are permitted as accessory structures.

Section 3. Roof-mounted satellite television antennas:

Shall not extend more than ten (10) feet above the height limit established for the zone in which the structure is located. Exceptions to these height requirements may be made by the approval of a special use permit under Section _____ of this ordinance.

Section 4. Ground-mounted satellite television antennas:

a. In residential zones, ground-mounted satellite television antennas shall not exceed **fifteen (15)** feet in height above the ground, unless a Special Use Permit is approved under Section _____ of this ordinance.

In all other zones, ground-mounted satellite television antennas shall not exceed **twenty (20)** feet in height above the ground unless a Special Use Permit is approved.

b. Ground-mounted satellite television antennas shall be permitted in any required rear, side or front yard provided such structures are located at least **five (5) feet** from the nearest part of the main building on the same lot and at least **five (5) feet** from any rear, front or side property line.

THE FOREGOING ORDINANCE was passed and adopted by the Board of Supervisors of the County of_____, State of _____, on the _____ day of 19_____, at a regular meeting of said Board, duly and regularly convened on said day, by the following roll call vote:

* This ordinance is derived, with modifications, from a California county ordinance passed in 1983.

Ordinance II

An Ordinance to Amend Article _____, Entitled "Supplementary Zone Regulations", of Chapter _____ of the City Code (City Zoning Ordinance) In Order to Create New Section _____ Entitled "Satellite Television Antennas" in Order to Provide Regulations with Respect to Their Construction, Erection and Use

BE IT ORDAINED, by the Mayor and Council of the City of_____ , in public meeting assembled, that Article _____ of Chapter _____ of the City Code is hereby amended in order to create new Section _____, entitled "Satellite Television Antennas" to read as follows:

Sec. _____. Satellite Television Antennas

No satellite television antenna shall be erected, constructed, maintained or operated except in conformance with the following regulations:

1. Definitions

1.1 **Satellite television antenna** is an apparatus capable of receiving communications from a transmitter or a transmitter relay located in planetary orbit.

1.2 **Usable satellite signal** is a satellite signal which when viewed on a conventional television set, is at least equal in picture quality to that received from local commercial television stations or by way of cable television.

2. Satellite Antenna Location

2.1 In any commercial, industrial or multi-family residential zone, such antenna may be located anywhere on the lot or buildings thereon.

2.2 In a non-commercial or single family zone, subject to the provisions contained herein, such antenna shall be located only in the rear yard of any lot. If a usable satellite signal cannot be obtained from such rear yard, the antenna may be located on the side or front yard of the property subject to the requirements contained in this Ordinance.

2.2(i) In the event that a usable satellite signal cannot be obtained by locating the antenna on the rear, side or front yard of the property, such antenna may be placed on the roof of the dwelling structure, provided that a building permit is obtained prior to such installation. Such permit shall be issued upon a showing by the applicant that a usable satellite signal is not obtainable from any other location on the property, and provided further, that the construction and erection otherwise is in compliance with the City Building Code and Electrical Code.

3. Antenna Size

3.1 Subject to Section 2.2(i), in a non-commercial or single family zone, such antenna shall not exceed twenty (20) feet in height, including any platform or structure upon which said antenna is mounted or affixed. Such antenna may not exceed fifteen (15) feet in diameter in a non-commercial or single family zone.

3.2 Except in a commercial, industrial or multi-family residential zone, satellite television antennas shall be located and designed to reduce visual impact from surrounding properties at street level and from public streets.

3.3 Not more than one satellite television antenna shall be allowed in any non–commercial or single family zone on any lot less than one-half (1/2) acre in size.

3.4 All antennas and the construction and installation thereof shall conform to applicable City Building Code and Electrical Code regulations and requirements.

3.5 Antennas shall meet all manufacturers' specifications, be of non-combustible and corrosive-resistant material, and be erected in a secure, wind-resistant manner.

3.6 Every antenna must be adequately grounded for protection against a direct strike of lightning.

DELIVERED to the Mayor of the City of _____, this ____ day of _____, 19____.

Approved/Vetoed by the Mayor of the City of _____, this ____ day of _____, 19____.

THIS IS TO CERTIFY that the foregoing Ordinance was adopted by the City Council of _____ in public meeting assembled, on the ____ day of _____, 19____, and that the same was approved/vetoed by the Mayor of the City of _____ on the ____ day of _____, 19____. This Ordinance will become effective on the ____ day of _____, 19____.

Earth station shielded from public view by natural foliage.

Earth station shielded from street by fence.

Backyard installation hidden from public view.

VII. Checklist of Things to Do in Preparation For a Hearing Before the Zoning Board On a Satellite Receiver

1. Obtain a copy of the statute-ordinance in question, read it and get an opinion of a qualified zoning attorney whether it impacts on a satellite installation.
2. Take pictures of your satellite installation from various angles to demonstrate favorable visual impact.
3. Take pictures of existing structures in the neighborhood nearby which are visually unappealing—water towers, billboards, large radio antennas, etc.
4. Contact friendly neighbors, bring them to the hearing if possible. They may testify that they like the satellite dish or that it does not bother them and that it does not harm property values. If they cannot come with you, have them write a letter in your support.

Can you see the earth station in this suburban back yard?

5. Contact other owners of satellite receivers or potential purchasers of those receivers for their support. Bring them to the hearing if possible.
6. Contact neighbors of other satellite earth station owners to testify that the antenna has not reduced property values and is not unsightly.
7. Contact others in the community who use satellite receivers or are interested in the technology, such as churches and schools. If you are subscribing to one of the satellite financial services or education services, contact them and request their support when you appear before the Zoning Board. Have them write a letter demonstrating the necessity of your earth station and its civic purposes. Letters from some of the other satellite services such as C-SPAN or one of the religious or advertising services may also be obtained to answer any questions concerning the legality of your receiving such satellite-originated programming.
8. Provide the Zoning Board with a copy of this book so that its members may acquaint themselves with satellite antennas and be guided in a positive direction.

Appendix I

Cases Concerning Neighbor Consent Ordinances

I. Delegation of Legislative Authority

Ordinances held valid

1. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976)

Due process rights of landowner who applied to city for "parking and yard" approval for proposed building were not violated by city charter amendment requiring proposed land use changes to be ratified in referendum vote by 55% of voters. The power of referendum was one reserved by the people to themselves and thus, the referendum decision was not delegation of legislative power. The Supreme Court found the referendum process not in itself so arbitrary as to be violative of the 14th Amendment, especially where the landowner had the right to challenge unreasonable results of the referendum in state court.

California – see	*Stockton v. Frisbie & Latta*, 270 P. 270 (Cal. Ct. App. 1928), *hearing denied* by Sup. Ct. Consent of 75% of residential landowners for permit to erect business building in residential zone.
Colorado – see	*Regennitter v. Fowler*, 290 P.2d 223 (Colo. 1955) No two-family dwellings in single-family dwelling zone absent consent of 80% of neighbors.
Delaware – see	*Myers v. Fortunato*, 110 A. 847 (Del. 1920)
Illinois – see	*Chicago v. Stratton*, 44 N.E. 853 (Ill. 1896)
Iowa – see	*Wolle v. Sioux City*, 229 N.W. 214 (Iowa 1930); *Downey v. Sioux City*, 227 N.W. 125 (Iowa 1929); *Huff v. Des Moines*, 56 N.W. 2d 54 (Iowa 1952) Ordinance prohibiting trailer parks in commercial zones absent consent of 60% of those in protected zone.
Kansas – see	*Schulte v. Garnett*, 348 P.2d 629 (Kan. 1960) No permit issued to erect gas station in residential area absent consent of those living within 250 feet of proposed building site.
Louisiana – see	*State ex rel. Dickason v. Harris*, 105 So. 33 (La. 1925)
Massachusetts – see	*Inspector of Buildings of Lowell v. Stoklosa*, 145 N.E. 262 (Mass. 1924)
Michigan – see	*East Lansing v. Smith*, 269 N.W. 573 (Mich. 1936)
Mississippi – see	*Hattiesburg v Mercer*, 115 So. 2d 165 (Miss. 1959)

New Hampshire – see	*Robwood Advertising Asso. v. Nashua*, 153 A.2d 787 (N.H. 1959) Application for variance in use of land or structure to be accompanied by consent of owners of 60% of property near proposed site.
Ohio – see	*Eskridge v. Sandusky*, 136 N.E. 2d 465 (1935) No construction of gas station absent consent of neighbors.
Oklahoma – see	*Muskogee v. Morton*, 261 P. 183 (Okla. 1927)
Washington – see	*Spokane v. Camp*, 97 P. 770 (Wash. 1908)

Ordinances held invalid

Delaware – see	*Dangel v. Williams*, 99 A.84 (Del. 1916)
Kentucky – see	*McCown v. Gose*, 51 S.W. 2d 251 (Ky. 1932); *Tilford v. Belknap*, 103 S.W. 289 (Ky. 1907)
Minnesota – see	*State ex rel. Foster v. Minneapolis*, 97 N.W. 2d 273 (Minn. 1959)
Missouri – see	*State ex rel. Daniels v. Kasten*, 382 S.W. 2d 714 (Mo. App. 1964) Provision requiring consent by 75% of all property owners in residential area to erection of business building in area invalid as being delegation of legislative power. Court found that the effect of the provision would be to make the right to build dependent on whim of owners in vicinity, without guidelines or standards, and result would be unequal treatment under the law.
Nebraska – see	*State ex rel. Omaha Gas Co. v. Withnell*, 110 N.W. 680 (Neb. 1907)
New Jersey – see	*Levy v. Mravlag*, 115 A. 350 (N.J. 1921)
New York – see	*Janas v. Town Board & Zoning Board of Appeals*, 382, N.Y.S. 394 (N.Y. App. Div. 1976); *People v. Deeks* 307 N.Y.S. 2d 914 (N.Y. App. Div. 1969); *Utica v. Hanna*, 195 N.Y.S. 225 (N.Y. 1922); *Glens Falls v. Standard Oil Co.*, 215 N.Y.S. 354 (N.Y. 1926); *Ballard v. Zoth*, 253 N.Y.S. 6 (N.Y. 1931)
Pennsylvania – see	*Exton Quarries Incorp. v. Zoning Board of Adjustment of West Whiteland Township*, (Pa. 1967)
South Carolina – see	*Willis v. Woodruff*, 20 S.E. 2d 699 (S.C. 1942)
Vermont – see	*Westford v. Kilburn*, 300 A.2d 523 (Vt. 1973)
Wisconsin – see	*State ex rel. Nehrbass v. Harper*, 156 N.W. 941 (Wis. 1916); *Wasilewski v. Biedrzycki*, 192, N.W. 989 (Wis. 1923).

II. Arbitrary Discrimination

Ordinances invalid

1. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928)

2. Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976)

Judgment of Ohio Supreme Court which found popular referendum provision invalid as an unlawful delegation of police power, reversed and remanded for consideration. The Supreme Court stated in dicta that if the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, the fact that the voters of Eastlake wished it would not save the provision.

Alabama – see	*Gillette v. Tyson*, 122 So. 830 (Ala. 1929); *Longshore v. Montgomery*, 119 So. 599, *cert. denied* 119 So. 601 (Ala. 1928)
California – see	*Coon v. Board of Public Works*, 95 P. 913 (Cal. 1908)
Colorado – see	*Willison v. Cooke*, 130 P. 828 (Colo. 1913)
Delaware – see	*Dangel v. Williams*, 99 A.84 (Del. 1916); *Appeal of Lloyd*, 196 A. 155 (Del. 1937)
Illnois – see	*Koos v. Saunders*, 182 N.E. 415 (Ill. 1932); *Klumpp v. Rhodes*, 200 N.E. 153 (Ill. 1936)
Iowa – see	*Downey v. Sioux City*, 227 N.W. 125 (Iowa 1929)
Kentucky – see	*Tilford v. Belknap*, 103 S.W. 289 (Ky. 1907); *McCown v. Gose, 51 S.W. 2d 251 (Ky. 1932)*
Missouri – see	*St. Louis v. Russell*, 22 S.W. 470 (Mo. 1893)
New York – see	*Concordia Collegiate Institute v. Miller*, 93 N.E. 2d 632 (N.Y. 1950); *Wertheimer v. Schwab*, 210 N.Y.S. 312 (N.Y. Sup. Ct. 1925); *Starin v. Village Board of Zoning Appeals*, 101 N.Y.S. 2d 80 (N.Y. Sup. Ct. 1950)
South Carolina – see	*Willis V. Woodruff*, 20 S.E. 2d 699 (S.C. 1942)
Utah – see	*Smith v. Barrett*, 20 P.2d 864 (Utah 1933)
West Virginia – see	*Austin v. Thomas*, 123 S.E. 590 (W. Va. 1924); *Carter v. Bluefield*, 54 S.E. 2d 747 (W. Va. 1949)
Wisconsin – see	*State ex rel. Nehrbass v. Harper*, 156 N.W. 941 (Wis. 1916)

III. Reasonableness

Ordinance held unreasonable and void

Colorado – see	*Willison v. Cooke*, 130 P. 828 (Colo. 1913)
Delaware – see	*Dangel v. Wiliams*, 99 A. 84 (Del. 1916)
Illinois – see	*Valkaner v. Chicago*, 148 N.E. 2d 767 (Ill. 1958)

Kentucky – see *Tilford v. Belknap*, 103 S.W. 289 (Ky. 1907)

New York – see *Kiel v. Zoning Board of Appeals*, 194 N.Y.S. 2d 346 (N.Y. 1959)

South Carolina – see *Willis v. Woodruff*, 20 S.E. 2d 699 (S.C. 1942)

Ordinance held reasonable and valid

Michigan – see *East Lansing v. Smith*, 269 N.W. 573 (Mich. 1936)

Virginia – see *Martin v. Danville*, 138 S.E. 629 (Va. 1927)

IV. Police Power

Ordinance violative of police power

Colorado – see *Willison v. Cooke*, 130 P. 828 (Colo. 1913)

Delaware – see *Dangel v. Willams*, 99 A. 84 (Del. 1916);
Appeal of Lloyd, 196 A. 155 (Del. 1937)

Illinois – see *Valkaner v. Chicago*, 148 N.E. 2d 767 (Ill. 1958);
Drovers Trust & Sav. Bank v. Chicago, 165 N.E. 2d 314 (Ill. 1960);
People ex rel. Goldberg v. Busse, 88 N.E. 831 (W. 1909);
People ex rel. Friend v. Chicago, 103 N.E. 609 (W. 1913);
Spies v. Board of Appeals, 169 N.E. 220 (Ill. 1929)

Nevada – see *State ex rel. Roman Catholic Bishop v. Hill*, 90 P 2d 217 (Nev. 1939)

New Jersey – see *Levy v. Mravlag*, 115 A. 350 (N.J. 1921);
Reimer v. Dallas, 129 A. 390 (N.J. 1925)

New York – see *Concordia Collegiate Institute v. Miller*, 93 N.E. 2d 632 (N.Y. 1950);
Starin v. Village Board of Zoning Appeals, 101 N.Y.S. 2d 80 (N.Y. Sup. Ct. 1950)

Pennsylvania – see *Appeal of Perrin*, 156 A. 305 (Pa. 1931)
Held that, although a consent ordinance was a reasonable exercise of the police power where it covered a use and locality to which the law of nuisance was applicable, yet when a municipal ordinance committed the use of police power to the option of individuals to determine whether the use of property for purely lawful purposes offended health, safety or welfare, such ordinance was violative of fundamental principles of police power.

Texas – see *Sparn v. Dallas*, 235 S.W. 513 (Tex. 1921);
Williams v. Whitten, 451 S.W. 2d 535 (Tex. Civ. App. 1970)

West Virginia – see *Austin v. Thomas*, 123 S.E. 590 (W. Va. 1924);
Carter v. Bluefield, 54 S.E. 2d 747 (W. Va. 1949)

Ordinance Not Violative of Police Power

	Eastlake v. Forest City Enterprises, 426 U.S. 688 (1976)
Delaware – see	*Myers v. Fortunato*, 110 A. 847 (Del. 1920)
Florida – see	*South Miami v. Shirley Homes, Inc.*, 291 So. 40 (Fla. Dist. Ct. App. 1974)
New York – see	*Nappi v. La Guardia*, 55 N.Y.S. 2d 80, *aff'd. without opinion*, 54 N.Y.S. 2d 722, *aff'd without opinion*, 64 N.E. 2d 716 (N.Y. 1944)
Ohio – see	*State ex. rel. Standard Oil Co. v. Combs*, 194 N.E. 875 (Ohio 1935)
Washington – see	*Chief Petroleum Corp. v. Walla Walla*, 116, P. 2d 560 (Wash. 1941)

Appendix II

Cases Concerning Restrictive Covenants

I. Covenant Held Valid

1. Strachan v. Burford, 162 S.E. 120 (Ga. 1931)

Agreement by neighboring landowner to maintain a fence at a maximum height of 4 feet enforceable. Plaintiff-neighbor erected his building in reliance upon the undertaking.

2. St. Louis, I.M. & S. Ry. v. O'Baugh, 5 S.W. 711 (Ark. 1887)

Covenant by a railroad that in consideration of the grant of an easement of way, it would maintain an embankment high enough to prevent flooding enforceable.

Covenant Held Invalid

1. Kurtz v. Potter, 60 N.Y.S. 764, *aff'd* 60 N.E. 1114 (N.Y. 1899)

Covenant purporting to restrict the property so that the "first buildings" erected on the land should be not less than 3 stories in height unenforceable. The court found nothing in the covenant which would prevent the landowner from removing the building originally erected and erecting upon the premises any building that could be used for any purpose.

Vagueness – question whether covenant is so vague or indefinite in its wording as to be unenforceable.

Covenant Held Valid

1. King v. Kugler, 197 Cal. App. 2d 651 (Cal. Dist. Ct. App. 1961)

Covenant prohibiting landowners from erecting building exceeding "one story in height" is not too vague to be enforceable. Common usage of the phrase "one story" was sufficiently clear and certain to support injunctive relief as "story" was commonly understood to refer to the habitable space between two floors. The court found "height" unambiguous as simply used to describe the measure of the structure upward from the ground.

2. *Seligan v. Tucker,* 6 Cal. App. 3d 691 (Cal. Dist. Ct. App. 1970)

Restrictive covenant which provided that "no structure shall be erected upon any lot (on a subdivision on a slope overlooking a valley) or in such height as to unreasonably obstruct the view from any other lot" was not invalid and unenforceable. Normally conscientious persons of average prudence and intelligence would have such a concept of what was unreasonable.

3. *Pool v. Denbeck,* 241 N.W. 2d 503 (Neb. 1976)

4. *Dickstein v. Williams,* 571 P.2d 1169 (Nev. 1977)

5. *Alloway v. Moyer,* 550 P.2d 1379 (Or. 1976)

6. *Wesley v. Sulzer,* 73 A. 338 (Pa. 1909)

Restrictions specifying that no building or part of a building exceeding 9 feet in height should be built on the "rear end" of the property enforceable.

7. *Smith v. Bradley,* 28 N.E. 14 (Mass. 1891)

Covenant Held Invalid

1. Anderson v. Bradley, 177 A.2d 227 (Conn. 1961)

2. *Henry v. Eves,* 159 A. 857 (Pa. 1932)

Covenant which provided that no buildings, except stables, coachhouses, greenhouses, or privies not exceeding 2 stories in height, should at any time be erected on the rear ends of lots unenforceable due to uncertainty. It was unclear which would be the rear ends of the lots or how much of the lots could be considered the rear ends. The court stated that reservations upon use of land were never favored by the law and that such provisions were never to be extended by implication but must instead be in express terms.

II. Application of Restrictions to Particular Structures

Whether height restriction, arguably pertaining to less than all of the area of, or structures on, a particular tract of land, is applicable to the structure or area considered by a court.

Structures or Area Included

1. *King v. Kugler,* 197 Cal. App. 2d 651 (Cal. Dist. Ct. App. 1961)

2. *Bernhard v. Tschirn,* 365 So. 2d 41 (La. App. 1978)

3. *Chase v. Walker,* 45 N.E. 916 (Mass. 1897)

4. *Goodlove v. Hamburger,* 187, N.W. 398 (Mich. 1922)

5. *Catoggio v. Rehm,* 90 A. 1047 (N.J. 1914)

6. *Bauer v. Gribbel,* 37 N.Y.S. 609 (N.Y. 1896)

7. *Meigs v. Milligan,* 35 A. 600 (Pa. 1896)

8. *Wesley v. Sulzer,* 73 A. 338 (Pa. 1909)

Structures or Area Not Included

1. Katsoff v. Lucertini, 103 A.2d 812 (Conn. 1954)

15-foot high billboard held not to be a "building" within the meaning of a restrictive covenant restricting building height to one story. The court stated that if the plaintiffs had desired to exclude all structures, as well as buildings, above a certain height, they might have easily found appropriate language to express their purpose.

2. Nowell v. Boston Academy of Notre Dame, 130 Mass. 209 (Mass. 1881)

Minimum height restriction pertaining to buildings to be erected on lot held inapplicable to brick wall on line of the street.

3. Smith v. Bradley, 28 N.E. 14 (Mass. 1891)

4. Hurley v. Brown,60 N.Y.S. 846 (N.Y. App. Ct. 1899)

5. Strauss v. Park, 259, N.Y.S. 2d 61 (N.Y. Sup. Ct. 1965)

III. Maximum-Height Restriction

Whether a particular structure exceeds a maximum height restriction contained in a deed covenant and expressed in terms of "stories" or "floors."

Height Restrictions Violated

1. King v. Kugler, 197 Cal. App. 2d 651 (Cal. Ct. App. 1961)

2. Pool v. Denbeck, 241 N.W. 2d 503 (Neb. 1976)

3. Dickstein v. Williams, 571 P.2d 1169 (Nev. 1977)

4. Snashall v. Jewell, 363 P.2d 566 (Or. 1961)

*5. Donaldson v. White,*493 P.2d 1380 (Or. 1972)

6. Drulard v. Le Tourneau, 593 P.2d 1118 (Or. 1979)

7. McDonough v. W.W. Snow Constr. Co., 306 A.2d 119 (Vt. 1973)

8. Fairwood Homes Asso. v. Pierce, 578 S.W. 2d 343 (Mo. App. 1979)

State and local governing agencies have authority over local zoning and property restrictions, inclusive of restricitve covenants running with the land.

Height Restriction Not Violated

1. *Howard Homes, Inc. v. Guttman,* 190 Cal. App. 2d 526 (Cal. Dist. Ct. App. 1966)
2. *Smith v. North,* 244 Cal. App. 245 (Cal. Dist. Ct. App. 1966)
3. *Coppotelli v. Dawson,* 269 Cal. App. 2d 731 (Cal. Dist. Ct. App. 1969)
4. *Hobson v. Cartwright,* 20 S.W. 281 (Ky. 1892)
5. *Metius v. Julio,* 342 A.2d 348 (Md. 1975)
6. *Johnson v. Linton,* 491 S.W. 2d 189 (Tex. Civ. App. 1973)

IV. Extinguishment of Restrictive Covenant

The general rule that the right to enforce a covenant restricting the use of property may be waived or abandoned or that equity may refuse enforcement because of changes in the nature of the neighborhood have been judicially recognized in connection with covenants imposing restrictions on the height of a structure or building.

Restrictions Waived or Abandoned

1. *Holmes Harbor Water Co. v. Page,* 508 P.2d 628 (Wash. 1973)

An injunction to enforce a restrictive covenant regulating height of structures to 15 feet, and seeking to require defendant owners to remove or lower roof was denied where defendant acted innocently, attempted to comply with covenant, and violation was unintentional. Plaintiffs delayed in bringing suit until construction was complete and failed to prove any injury. The court found the cost of removing the violation was exorbitant when compared with the subject infraction of the covenant.

2. *Melson v. Ormsby,* 151 N.W. 817 (Iowa 1915)

Plaintiff, by not previously insisting on strict compliance with deed restiction, was held to have abandoned his right to enforce compliance with the restriction.

3. *Rich v. Isbey,* 238 N.W. 353 (Mich. 1939)

Numerous and continued violations throughout subdivision indicated no justification for the restriction of defendant's hedge to the 4-foot restriction.

4. *Henry v. Eves,* 159 A. 857 (Pa. 1932)

Change in character of neighborhood justified court's refusal to enforce deed restriction against the erection of any buildings not exceeding certain height.

Restrictions Not Waived or Abandoned

1. *McDonough v. W.W. Snow Constr. Co.,* 306 A.2d 119 (Vt. 1973)

Under restrictive covenant forbidding the erection of more than a single story dwelling in order to protect the view of other dwellings, defendant was properly required to remove the second story from dwelling he had built on level grade. Plaintiffs had not waived or abandoned right to enforce covenant by building basements in their dwellings where there was a difference in grade.

2. *Dauphin Island Property Owner's Assoc. v. Kuppersmith*, 371 So. 2d 31 (Ala. 1979)
3. *Seligmon v. Tucker*, 6 Cal. App. 3d 691 (Cal. App. 1970)
4. *King v. Kugler*, 197 Cal. App. 2d 651 (Cal. App. 1961)
5. *Sandstrom v. Larsen*, 538 P.2d 971 (Hawaii 1978)
6. *Boston-Edison Protective Assoc. v. Goodlove*, 227 N.W. 772 (Mich. 1929)
7. *Pool v. Denbeck*, 241 N.W. 2d 503 (Neb. 1976)
8. *Gladstone v. Gregory*, 596 P.2d 491 (Nev. 1979)
9. *Dickstein v. Williams*, 571 P.2d 1169 (Nev. 1977)
10. *Alloway v. Moyer*, 550 P.2d 1379 (Or. 1976)

Appendix III

Cases Concerning Accessory Use

I. A. Cases ruling it is proper to consider radio or TV facility (tower) an accessory use in a residential use district.

Arizona – see	*Paradise Valley v.Lindberg*, 27 Ariz. App. 70, 551 P.2d 60 (Ariz. 1976) Amateur ham radio operator can erect 90-foot radio tower.
Colorado – see	*Baysinger v. City of Northglenn*, 575 P.2d 425 (Colo. 1978) Ordinance requiring acquistion of a special use permit for radio and television towers and antennas held overbroad and void where it applied not only to persons seeking to erect amateur radio towers and antennas, but also to owners of all devices whose operation requires use of an antenna. Invalid exercise of police power to require special use permit for accessory uses (AM–FM radio TV sets).
Minnesota – see	*St. Louis Park v. Casey*, 218 Minn. 394, 16 N.W. 2d 459 (Minn. 1944) 60–foot pole, two 30–foot poles allowed
New Jersey – see	*Wright v. Vogt*, 7 N.J. 1, 80 A.2d 108 (N.J. 1951) *Skinner v. Zoning Board of Adjustment*, 80 N.J. Super 380, 193 A.2d 861 (N.J. 1963) 100–foot radio tower, for use by amateur for his hobby, allowed
New York – see	*In re Application for Faith for Today, Inc.*, 204 N.Y.S. 2d 751, *aff'd* N.Y. 2d 761, 215 N.Y.S. 2d 70, 174 N.E. 2d 743 (N.Y. 1960)
Ohio – see	*Dettmar v. County Board of Zoning Appeals*, 273 N.E. 2d 291 (Ohio 1971) 64–foot radio antenna, for use by amateur radio operator, allowed.
Pennsylvania – see	*Appeal of Lord*, 368 PA. 121, 81 A.2d 533 (Pa. 1951); *Schmigel v. Board of Adjustment*, 114 Pitt Leg J 117 (Pa. 1966) 50–foot antenna allowed.

I. B. Cases ruling it is proper to consider radio or TV facility (tower) **not** an accessory use in a residential use district.

New York – see	*Presnel v. Leslie*, 144 N.E. 2d 381 (N.Y. 1957)
Pennsylvania – see	*Gallagher v. Zoning Board of Adjustment*, 32 Pa. D. & C. 2d 669 (Pa, 1963) 101–foot antenna not allowed.
Washington – see	*State ex rel. Carpenter v. Everett Board of Adjustment*, 503 P.2d 1141 (Wash. 1972) 72–foot amateur radio tower considered "building" within meaning of code and therefore restricted to 35–foot height limit.
Michigan – see	*City of Muskegon Heights v. Wilson*, 109 N.W. 2d 768 (Mich. 1961) Operation of commercial radio station in residential zone not considered "home occupation;" 120–foot tower and antenna found to interfere with neighbors' TV reception.

Appendix IV

Cases Concerning Aesthetic Zoning

I. Zoning ordinances based solely or predominantly on aesthetic considerations are considered invalid by the states listed immediately below.

California – see	*Thille v. Board of Public Works*, 225 P.294 (Cal. 1927); *Clemens v. Los Angeles*, 222 P.2d 443 (Cal. 1950)
Colorado – see	*Willison v. Cooke*, 130 P. 828 (Colo. 1913)
Connecticut – see	*Gionfriddo v. Windsor*, 81 A.2d 266 (Conn. 1951)
Delaware – see	*Frankling Bldrs., Inc. v. Sartin*, 207 A.2d 12 (Del. 1964)
Iowa – see	*Stoner McCray System v. Des Moines*, 78 N.W.2d 843 (Iowa 1956)
Kansas – see	*Ware v. Wichita*, 214 P. 99 (Kan. 1923)
Kentucky – see	*Standard Oil Co. v. Bowling Green*, 50 S.W.2d 960 (Ky. 1932)
Louisiana – see	*New Orleans v. Levy*, 64 So.2d 798 (La. 1953)
Maine – see	*Wright v. Michaud*, 200 A.2d 543 (Me. 1964)
Maryland – see	*Goldman v. Crowther*, 128 A. 50 (Md. 1925)
Massachusetts – see	*Barney & Casey Co. v. Milton*, 87 N.E. 2d 9 (Mass. 1949); *122 Main Street Corp. v. Brockton*, 84 N.E. 2d 13 (Mass. 1949)
Michigan – see	*Hitchman v. Oakland Township*, 45 N.W. 2d 306 (Mich. 1951)
Mississippi – see	*Jackson v. Bridges*, 139 So. 2d 660 (Miss. 1962)
Missouri – see	*Women's Kansas City Saint Andrew Society v. Kansas City*, 58 F.2d 593 (8th Cir. 1932), applying Missouri law

Nebraska – see	*Baker v. Somerville*, 293 N.W. 326 (Neb. 1940)
Ohio – see	*Euclid v. Fitzhom*, 357 N.E. 2d 402 (Ohio App. 1976
Pennsylvania – see	*Appeal of Girsh*, 263 A.2d 395 (Pa. 1970)
Rhode Island – see	*Providence v. Stephens*, 133 A. 614 (R.I. 1926)
Tennessee – see	*Norris v. Bradford*, 321 S.W. 2d 543 (Tenn. 1958)
Texas – see	*Niday v. Belaire*, 251 S.W. 2d 747 (Tex. Civ. App. 1952)
Virginia – see	*Kenyon Peck, Inc. v. Kennedy*, 168 S.E. 2d 117 (Va. 1969)

II. Zoning ordinances based solely on predominantly aesthetic considerations are considered **valid** by the states listed immediately below.

Florida – see	*Rotenberg v. Fort Pierce*, 202 So. 2d 782 (Fla. App. 1967); *State v. Estate of Moore*, 153 So. 2d 819 (Fla. 1963)
Illinois – see	*Continental Homes of Chicago, Inc. v. County of Lake*, 346 N.E. 2d 226 (Ill. App. Ct. 1976); *Ward v. County of Cook*, 386 N.E. 2d 309 (Ill. 1979)
New York – see	Although most of the earlier New York decisions held that zoning ordinances based solely or predominantly on aesthetic considerations were necessarily invalid, the most recent New York cases support the view that zoning ordinances may be valid even though based solely or predominantly on aesthetic considerations. *People v. Stover*, 191 N.E. 2d 272 (N.Y. 1963), *app. dis.* 375 U.S. 42, 84 S. Ct. 147 (1963); *Cromwell v. Ferrier*, 225 N.E. 2d 749 (N.Y. 1967); *Suffolk Housing Services v. Brookhaven*, 397 N.Y.S. 2d 302 (N.Y. Sup. Ct. 1977)
North Carolina – see	*Cumberland v. Eastern Federal Corp.*, 269 S.E. 2d 672 (N.C. 1980), *pet. denied* 273 S.E. 2d 453 (N.C. 1980)
New Jersey – see	*Westfield Motor Sales Co. v. Westfield*, 324 A.2d 113 (N.J. 1974); *State v. Miller*, 416 A.2d 821 (N.J. 1980)

III. Zoning ordinances based partly or incidentally on aesthetic considerations are considered not necessarily invalid under the decisions listed immediately below.

Arizona – see	*Phoenix v. Fehlner*, 363 P.2d 607 (Ariz. 1961)
California – see	*National Advertising Co. v. County of Montery*, 27 Cal. Rptr. 136 (Cal. App. 1962)
Connecticut – see	*Murphy, Inc. v. Westport*, 40 A.2d 177 (Conn. 1944)
Delaware – see	*Franklin Buildings, Inc. v. Sartin*, 207 A.2d 12 (Del. 1964)

Iowa – see	*McMahon v. Dubuque*, 255 F.2d 154 (8th Cir. 1958), applying Iowa law
Kansas – see	*Ware v. Wichita*, 214 P.99 (Kan. 1923)
Louisiana – see	*New Orleans v. Levy*, 64 So. 2d 798 (La. 1953)
Maine – see	*Wright v. Michaud*, 200 A.2d 543 (Me. 1964)
Massachusetts – see	*Barney & Casey Co. v. Milton*, 87 N.E. 2d 9 (Mass. 1949)
Michigan – see	*Hitchman v. Oakland Township*, 45 N.W. 2d 306 (Mich. 1950); *Sun Oil Co. v. Madison Heights*, 199 N.W. 2d 525 (Mich. App. 1972); *Central Advertising Co. v. Ann Arbor*, 201 N.W. 2d 365 (Mich. App. 1972)
Minnesota – see	*State v. Modern Box Makers*, 13 N.W. 2d 731 (Minn. 1944); *Naegele Outdoor Advertising co. v. Minnentonka*, 162 N.W. 2d 206 (Minn. 1968)
Missouri – see	*St. Louis v. Friedman*, 216 S.W. 2d 475 (Mo. 1948); *Women's Kansas City Saint Andrew Society v. Kansas City*, 58 F.2d 593 (8th Cir. 1932), applying Missouri law
Nebraska – see	*Baker v. Somerville*, 293 N.W. 326 (Neb. 1940)
New Hampshire – see	*Piper v. Meredith*, 266 A.2d 103 (N.H. 1970); *Sundeen v. Rogers*, 141 A. 142 (N.H. 1928)
New Jersey – see	*United Advertising Corp. v. Metuchen*, 198 A.2d 447 (N.J. 1964)
New Mexico – see	*Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13 (N.M. 1964)
New York – see	*Presnell v. Leslie*, 144 N.E. 2d 381 (N.Y. 1957)
North Carolina – see	*In re Parker*, 197 S.E. 706 (N.C. 1938), *app. dis.* 305 U.S. 568, 59 U.S. Ct. 150 (1938)
Ohio – see	*Pepper Pike v. Landskroner*, 371 N.E. 2d 579 (Ohio 1977); *Pritz v. Messer*, 149 N.E. 30 (Ohio 1925)
Oregon – see	*Milwaukee Company of Jehovah's Witnesses v. Mullen*, 330 P.2d 5 (Or. 1958), *app. dis.* and *cert. denied* 359 U.S. 436, 79 S. Ct. 940 (1958)
Pennsylvania – see	*Bilbar Construction Co. v. Easttown Township Board of Adjustment*, 393 Pa. 62, 141 A.2d 851 (Pa. 1958)
Tennessee – see	*State ex rel Lightman v. Nashville*, 60 S.W. 2d 161 (Tenn. 1963)
Texas – see	*Lombardo v. Dallas*, 73 S.W. 2d 475 (Tex. 1934)
Virginia – see	*West Brothers Brick Co. v. Alexandria*, 192 S.E. 881 (Va. 1937), *app. dis.* 302 U.S 658, 58 S. Ct. 369 (1937), *reh. den.* 302 U.S. 781, 58 S. Ct. 480 (1938)
Washington – see	*Duckworth v. Bonney Lake*, 586 P.2d 860 (Wash. 1978)
Wisconsin – see	*Jefferson County v. Timmel*, 51 N.W. 2d 518 (Wis. 1952)

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